

Dormant Foreign Affairs Preemption and *Von Saher v. Norton Simon Museum*: Complicating the “Just and Fair Solution” to Holocaust-Era Art Claims

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Introduction

In *Von Saher v. Norton Simon Museum*,¹ the Court of Appeals for the Ninth Circuit struck down a California law extending the statute of limitations for Holocaust-era art restitution claims against museums.² It affirmed the district court’s holding that the statute was preempted by the federal foreign relations power, reversed the determination that the claim was time-barred under the regular California statute of limitations for stolen property, and remanded the case.³ The decision prolongs a dispute between the sole heir of a prominent Jewish art dealer in Amsterdam whose collection was seized by Nazi agents in 1940, and the California museum that later purchased two paintings from that collection.⁴ *Von Saher* seems to be a straightforward application of a line of Ninth Circuit and Supreme Court precedent preempting state action that intrudes on the federal province of foreign relations.⁵ But, viewed in light of this precedent and its particular facts, *Von Saher* is a flawed decision that highlights problems with the rarely invoked and constitutionally infirm doctrine of dormant foreign affairs

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1. 578 F.3d 1016 (9th Cir. 2009), *amended and superseded on denial of reh’g en banc* by No. 07-56691, 2010 WL 114959 (9th Cir. Jan. 14, 2010).

2. CAL. CIV. PROC. CODE § 354.3(b) (West 2006), *invalidated by Von Saher*, 2010 WL 114959. *See infra* Part VI.B.

3. *Von Saher*, 578 F.3d at 1031.

4. Suzanne Muchnic, *What is Their True Genesis? Questions About Long-Ago Events Have the Norton Simon Fighting in Court to Keep Its Prized Works*, L.A. TIMES, Aug. 22, 2009, at D1.

5. *See infra* Part IV.

preemption.⁶ Further, by placing such a general limit on states' ability even to facilitate the adjudication of certain claims by Holocaust victims, it undermines the broadly stated federal interest in seeing Holocaust-era assets returned to their rightful owners.⁷

This Article addresses dormant foreign affairs preemption with respect to claims for property misappropriated during World War II. It argues that *Von Saher* and the precedent upon which it relied were wrongly decided. Absent either a clear conflict with a federal statute or treaty, or an affirmative action by the federal government, courts should apply a more stringent test than was applied in *Von Saher* or its predecessors before preempting state law on this basis. Beginning with Part I, this Article describes the nature and scale of the looting of works of art in Nazi-controlled territories during the war, which targeted Jews and other minorities in particular, and the participation of the U.S. government in mitigating and rectifying the resulting losses. Part II provides background on states' ability to resolve claims related to the Holocaust. Part III describes the categories of Holocaust-related litigation in the United States since 1996, when the first high-profile cases were filed, as well as the foreign policy dimensions of each. Part IV outlines the Holocaust-related cases in the Ninth Circuit leading up to *Von Saher*. Part V describes the particular facts and history of *Von Saher*. Part VI analyzes *Von Saher* and its foreign policy implications. It argues that *Von Saher* does not present a case of preemption, but rather, a case that is nonjusticiable under either the political question doctrine or the act of state doctrine. This Article concludes that there is no constitutional impediment to states establishing special statutes of limitations for Holocaust-related art claims, and that such statutes may further the federal policy of reaching a "just and fair solution"⁸ to claims for Holocaust-era assets.

6. See *infra* Part VI.

7. See *infra* Part VI.D.

8. *Washington Conference Principles on Nazi-Confiscated Art*, in WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS: PROCEEDINGS 971, 971-72 (J.D. Bindenagel ed., 1999), available at <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

I. Nazi Loot, Post-War Restitution, and U.S. Foreign Policy

A. Nazi Looting and Allied Efforts to Protect Works of Art

The story of Holocaust-era art looting as a result of the Third Reich's systematic persecution of Jews and other ethnic minorities has been well chronicled and frequently recounted.⁹ Beginning with Adolf Hitler's rise to power in 1933, the Nazi party and its agents seized millions of items of property—including hundreds of thousands of works of art¹⁰—throughout the territories it controlled using “theft, confiscation, coercive transfer, looting, pillage, and destruction.”¹¹ The pillage was motivated not solely by greed but also by Hitler's “larger political and ideological project,”¹² which included promotion of his vision of a Germanic nation and the dehumanization and planned extermination of the Jewish people.¹³

In 1943, recognizing the scale of the plunder, the Allies formally reserved the right to invalidate transfers of property in enemy-occupied territory,¹⁴ and President Franklin D. Roosevelt established a commission and a military unit charged with preserving and protecting cultural property in the war zone.¹⁵ After the German surrender in 1945, this unit helped establish temporary “central collecting points” where more than four million items of recovered property were recorded and stored until they could be returned.¹⁶

9. For a detailed history, see LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994). For a more concise overview of the major issues, see NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* 1–12 (2000).

10. The number of works of art looted by the Nazis is not known—an educated estimate is approximately 650,000. Jonathan Petropoulos, *Art Looting During the Third Reich*, in WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS: PROCEEDINGS, *supra* note 8, at 441, 442.

11. AM. ASS'N OF MUSEUMS, *GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA* (1999), available at http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm.

12. Petropoulos, *supra* note 10, at 443.

13. *Id.*; see also NICHOLAS, *supra* note 9, at 5–25, 41–49.

14. See PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., *PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS SR-139* (2000) (discussing the London Declaration of 1943).

15. See NICHOLAS, *supra* note 9, at 209–22. The American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas created the Monuments, Fine Arts and Archives Section to gather, safeguard, and repatriate works of art displaced by World War II. See *id.* at 217–27.

16. NAT'L ARCHIVES & RECORDS ADMIN., M1941: RECORDS CONCERNING THE CENTRAL COLLECTING POINTS 2 (2004), available at <http://www.archives.gov/>

B. U.S. Policy and Restitution Practice in Europe

At the end of the hostilities, confronted with massive stockpiles of recovered property, the Allies adopted a policy of "external restitution," returning identifiable property not to individuals, but to the legitimate governments of the nations where the property had been taken from its owners.¹⁷ Returning property to governments rather than individuals, while expedient, was only partly motivated by "administrative convenience."¹⁸ More importantly, it reflected a recognition of each government's responsibility to its own citizens and a deference to the sovereign right of each nation to determine the proper course of action.¹⁹ As the U.S. committee responsible for shaping this policy noted, "[t]he question of restoration to individual owners is a matter for these [legitimate] governments to handle in whatever way they see fit."²⁰

Under this policy, the Allies returned recovered property to various countries outside Germany.²¹ National claims commissions then returned thousands of works to individual claimants in the years immediately following the war,²² but even today many works remain unclaimed.²³ In the 1990s, the end of the Cold War and the opening of previously inaccessible historical records in Eastern Europe created new interest in the subject of Holocaust loot.²⁴ In response, various European governments initiated renewed research into the history of unclaimed works of art lingering in national collections,²⁵ leading to new publications, the reopening of some claims procedures, and sustained awareness of the issue.²⁶

research/microfilm/m1941.pdf (describing the records held and how they are organized).

17. See PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., *supra* note 14, at SR-142-45.

18. *Id.* at SR-140 (citing Memorandum from the Interdivisional Comm. on Reparation, Restitution, & Prop. Rights, Subcomm. 6 (Apr. 10, 1944) (recommending a policy of external restitution)).

19. *Id.*

20. *Id.*; see also *id.* at SR-139 (citing Memorandum from the Interdivisional Comm. on Reparation, Restitution, & Prop. Rights, Subcomm. 2 (Feb. 5, 1944) ("[I]ndividual claimants should look for satisfaction of their claims solely to their national governments.")).

21. See *id.* at SR-143; see also PALMER, *supra* note 9, at 124.

22. Lynn Nicholas, *Plenary Session Remarks: Nazi-Confiscated Art Issues*, in WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, *supra* note 8, at 449, 450.

23. See PALMER, *supra* note 9, at 118-28 (summarizing the status of European restitution efforts).

24. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., *supra* note 14, at 4.

25. PALMER, *supra* note 9, at 129-49 (describing current initiatives to identify and return looted art).

26. *Id.*; see also ORIGINS UNKNOWN, REPORT ON THE PILOT STUDY INTO THE

II. Limits on State and Judicial Action Relating to Holocaust-Era Claims

It is helpful to preface any overview of recent Holocaust-related litigation in the United States with a discussion of the limits on the ability of states and courts to resolve these types of claims. The constitutional principles of federal supremacy and separation of powers, which together establish that the executive and legislative branches have primary responsibility for foreign relations,²⁷ constrain the ability of states to provide remedies for wartime wrongs and the ability of courts to adjudicate claims arising from them. Recognizing this, courts have invoked three related but distinct doctrines in connection with Holocaust-era art claims: the act of state doctrine, the political question doctrine, and foreign affairs preemption.

A. Act of State Doctrine

The Supreme Court articulated the act of state doctrine in *Underhill v. Hernandez*²⁸ in 1897 and provided generally that, absent a treaty or specific rules governing the applicable legal principles, U.S. courts will not “sit in judgment on the acts of the government of another [country] done within its own territory.”²⁹ Early post-war litigation in the United States established that—consistent with the principles of the 1943 London Declaration and the stated policy of the executive branch—the acts of the Nazi government were not entitled to deference under the act of state doctrine.³⁰ Courts and parties have invoked the doctrine, however,

PROVENANCE OF WORKS OF ART RECOVERED FROM GERMANY AND CURRENTLY UNDER THE CUSTODIANSHIP OF THE STATE OF THE NETHERLANDS (1998), available at <http://www.herkomstgezocht.nl/eng/rapportage/index.html> (follow “Download” hyperlink under report title) (unpaginated English translation available as well as paginated Dutch original); Leila Anglade, *Art, Law and the Holocaust: The French Situation*, 4 ART, ANTIQUITY & L. 301, 306 (1999) (describing the status of restituted works in France).

27. See *infra* Part II.C.

28. 168 U.S. 250, 252 (1897).

29. *Id.*; see generally Lucy Dunn Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi Looted Art*, 11 UCLA J. INT’L L. & FOREIGN AFF. 281 (2006) (describing problems associated with the act of state doctrine as applied to art looted during the Holocaust).

30. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (holding that because the stated executive policy is to “relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials,” courts are permitted to do so).

in connection with Holocaust-era art claims involving the acts of other nations.³¹

B. Political Question Doctrine

The political question doctrine, like the act of state doctrine, is a prudential limitation on courts' ability to hear certain cases. It serves to prevent, based on separation of powers, the adjudication of issues best resolved by other branches of government. The most frequently cited articulation of this doctrine comes from the Supreme Court's decision in *Baker v. Carr*,³² pronouncing six ways in which a political question might manifest:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³³

When a case is "inextricable" from one of these formulations, a court may dismiss it as nonjusticiable.³⁴ Courts have both dismissed, and declined to dismiss, Holocaust-related claims on political question grounds.³⁵

31. See *United States v. Portrait of Wally*, No. 99-CV-9940, 2009 WL 3246991 (S.D.N.Y. Sept. 30, 2009) (holding that the act of state doctrine did not require abstention from hearing a forfeiture case brought against an Austrian museum by heirs of a dispossessed Jewish owner); see also *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 310 (D.D.C. 2005) (noting that federal legislation was passed specifically to restrict application of the act of state doctrine "as a bar to jurisdiction over claims to property allegedly taken in violation of international law" (quoting U.S. Statement of Interest at 5–6, *Malewicz*, 362 F. Supp. 2d 298 (No. CIV. A. 04-002))).

32. 369 U.S. 186 (1962).

33. *Id.* at 217.

34. *Id.*

35. See *In re Nazi Era Cases Against German Defendants Litig.*, 196 F. App'x 93, 98 (3d Cir. 2006) (dismissing a Holocaust survivor's personal injury claims); see also *Gross v. German Found. Initiative*, 456 F.3d 363, 391 (3d Cir. 2006) (holding that despite an executive branch policy favoring nonjudicial resolution of Holocaust-era claims, a claim seeking additional compensation did not pose a political question); *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005) (applying the political question doctrine reasoning and ultimately determining that only some of the Holocaust survivors' claims were justiciable).

C. Foreign Affairs Preemption

The Constitution vests specific powers related to the conduct of foreign affairs in the various branches of the federal government, including the power to regulate foreign commerce, declare war, make treaties, and hear cases involving ambassadors and foreign states.³⁶ At the same time, it denies the states such powers as the ability to enter into treaties or to collect duties on imports or exports.³⁷ State law yields to federal law in the form of the Constitution, federal laws, and treaties.³⁸ On this basis, courts have invalidated state actions not in harmony with federal laws and objectives concerning foreign relations.³⁹ A state law may be preempted by a federal statute or treaty that conflicts with or displaces the state law (statute or treaty preemption),⁴⁰ by executive branch action that signals an intent to preempt the state law (executive branch preemption),⁴¹ or by a judicial determination that, even absent positive law or federal action, the state law intrudes into an area that is expressly reserved to the federal government (dormant foreign affairs preemption).⁴²

36. U.S. CONST. art. I, § 8 (granting the legislature the power to regulate commerce with foreign nations and declare war); *id.* art. II, § 2 (granting the executive the power to make treaties with advice and consent of Senate and to appoint ambassadors); *id.* art. III, § 2 (granting the judiciary the power to hear cases involving ambassadors, public ministers, and consuls, and controversies involving foreign states, citizens, and subjects).

37. *Id.* art. I, § 10 (denying states the power to make treaties or tax imports or exports).

38. *Id.* art. VI, § 1.

39. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding a state government procurement law, prohibiting state entities from purchasing goods or services from companies doing business with Burma, was preempted by a federal statute imposing sanctions on Burma); see also *Zschernig v. Miller*, 389 U.S. 429 (1968) (holding a state statute governing inheritance rights of foreign citizens was preempted by the federal foreign affairs power); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding a state alien registration statute was preempted by the federal alien registration statute).

40. *Crosby*, 530 U.S. 363; *Hines*, 312 U.S. 52.

41. *E.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding a California statute requiring insurers to disclose information about wartime policies was preempted by the executive branch policy of resolving Holocaust-era insurance claims through nonjudicial international mechanisms). *But cf.* Presidential Memorandum: Preemption, 74 Fed. Reg. 24,693 (May 20, 2009) (expressly directing heads of executive departments and agencies not to preempt state law through federal regulations without "full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption").

42. See, *e.g.*, *Zschernig*, 389 U.S. at 441 ("Yet, even in absence of a treaty, a State's policy may disturb foreign relations. . . . [The state statute] has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.").

Dormant foreign affairs preemption, the basis of *Von Saher*, was established in 1968 in *Zschernig v. Miller*.⁴³ In *Zschernig*, the East German next-of-kin of an intestate Oregon decedent challenged a Cold War-era Oregon statute limiting the rights of foreign nationals to inherit property from state residents.⁴⁴ The Oregon Supreme Court, citing the U.S. Supreme Court's interpretation of a 1923 treaty between the United States and Germany, held that the plaintiffs could inherit the real property but not the personal property.⁴⁵ The Supreme Court, reversing, did not revisit or rely on interpretation of the treaty.⁴⁶ Instead, it found the statute unconstitutional because, by permitting "real or imagined wrongs" to be inflicted on foreign subjects and by asking courts to pass judgment on the administration of foreign law, the statute risked disrupting the federal government's ability to carry on foreign relations.⁴⁷

III. Holocaust-Related Litigation in the United States

Holocaust-related litigation in the United States can be divided into four major types of restitution and compensation claims: Swiss bank-related claims, forced labor claims, insurance claims, and art claims. Each implicates foreign relations in a different way.

A. Swiss Bank Litigation

Plaintiffs filed class action lawsuits in 1996 alleging that Swiss banks had wrongfully retained and concealed the assets of Holocaust victims, laundered funds for the Nazis, profited from the war, and generally furthered Nazi objectives.⁴⁸ Settlement talks began almost immediately, and the consolidated class actions were settled in 2000 for \$1.25 billion.⁴⁹ As of 2009, over \$1 billion had

43. *Id.*

44. *Id.* at 430–31. The statute prevented inheritance of real or personal property by citizens of nations that did not provide reciprocal inheritance rights to U.S. citizens and citizens of nations where the proceeds of the estate could be seized by the government. *Id.*

45. *Id.* at 431.

46. *Id.* at 432.

47. *Id.* at 436, 440–41.

48. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000), *aff'd*, *Friedman v. Union Bank of Switz.*, 413 F.3d 183 (2d Cir. 2005).

49. *Id.* at 141, 166. See generally Melvyn I. Weiss, *A Litigator's Postscript to the Swiss Banks and Holocaust Litigation Settlements: How Justice Was Served*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 103, 103–06 (Michael J. Bazylar & Roger P. Alford eds., 2006) (detailing the experiences of one attorney who represented Holocaust victims during the litigation).

been paid out to nearly 500,000 class members.⁵⁰ Although the bank litigation and settlement raised no preemption issues,⁵¹ the case had significant foreign policy implications,⁵² highlighting a clash between the foreign policy objectives of the federal government and those of the states.⁵³ Concurrent with the diplomatic involvement of the State Department, approximately twenty states and thirty municipalities enacted or threatened some form of trade sanctions against Switzerland,⁵⁴ causing tension not just between the Swiss government and the State Department, but also between the State Department and state governments.⁵⁵ The Swiss refused to agree to a settlement until the threats of sanctions were withdrawn.⁵⁶ Also, in requiring plaintiffs to release all unknown claims, the terms of the settlement specifically limited certain state remedies.⁵⁷ The settlement required plaintiffs to waive their rights under any state statute that prohibited general releases from applying to claims unknown at the time of the release.⁵⁸

B. Human Rights and Slave Labor Litigation

Soon after the first bank-related suits were filed, other plaintiffs sued German companies for their wartime exploitation of slave labor.⁵⁹ The German government, at the urging of German industry, sought a diplomatic solution to limit its potential liability.⁶⁰ The resulting German Foundation Agreement, negotiated primarily between Germany and the United States,⁶¹

50. SWISS BANKS SETTLEMENT: IN RE HOLOCAUST VICTIM ASSETS LITIG., SWISS BANKS SETTLEMENT FUND DISTRIBUTION STATISTICS AS OF DECEMBER 31, 2009 1 (2009), http://www.swissbankclaims.com/Documents_New/Distribution%20Statistics.pdf.

51. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 142.

52. Weiss, *supra* note 49, at 104–05.

53. David E. Sanger, *McCall and State Dept. Clash on Sanctions Against Swiss over Gold*, N.Y. TIMES, July 23, 1998, at B1.

54. *Swiss Do Right Thing—Under Pressure*, PHILA. INQUIRER, Aug. 16, 1998, at E3.

55. Sanger, *supra* note 53, at B1.

56. John M. Goshko, *Swiss Banks' Pact Ends N.Y. Threat of Sanctions: Holocaust Victims, Heirs Due Restitution*, WASH. POST, Aug. 14, 1998, at A14.

57. Settlement Agreement § 12.2, *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (Nos. 96 Civ. 4849, 99 Civ. 5161, 97 Civ. 461), available at http://www.swissbankclaims.com/Documents/Doc_9_Settlement.pdf.

58. *Id.*

59. Weiss, *supra* note 49, at 106–08.

60. *Id.* at 106.

61. Aine Durkin, *The German Foundation Agreement: A Nonexclusive Remedy and Forum*, 42 U.C. DAVIS L. REV. 567, 575–76 (2008).

was formalized in 2000.⁶² The German government and German companies established a fund of 10.1 billion Deutsche Marks⁶³ to pay the compensation claims of those who had been forced to work.⁶⁴ By 2007, the Foundation had completed its mission, having disbursed just under 8.7 billion Deutsche Marks⁶⁵ to approximately 1.66 million Holocaust victims.⁶⁶

The creation of the Foundation had implications for the ability of individuals or classes to litigate their claims. In exchange for Germany establishing the Foundation, the United States agreed to file an advisory "Statement of Interest" in any related domestic litigation, stating the federal interest in resolving claims exclusively through the Foundation, and urging courts to dismiss claims if there were any legal grounds for doing so.⁶⁷

C. Insurance Litigation

The class-action insurance claims began in 1997,⁶⁸ based on Holocaust-era policies that were either confiscated, never paid, or paid over to the Nazi government at the Nazis' direction.⁶⁹ Within a year, the National Association of Insurance Commissioners and several insurance companies had formed a voluntary, non-governmental association called The International Commission on

62. "A MUTUAL RESPONSIBILITY AND A MORAL OBLIGATION:" THE FINAL REPORT ON GERMANY'S COMPENSATION PROGRAMS FOR FORCED LABOR AND OTHER PERSONAL INJURIES 7 (Michael Jansen & Günter Saathoff eds., 2009) [hereinafter *MUTUAL RESPONSIBILITY*].

63. *Id.* at 91.

64. Durkin, *supra* note 61, at 580.

65. *MUTUAL RESPONSIBILITY*, *supra* note 62, at 91.

66. *Id.* at 11.

67. Durkin, *supra* note 61, at 578; *see also* *MUTUAL RESPONSIBILITY*, *supra* note 62, at 56–64 (discussing the negotiations that created the Foundation). Courts used varying legal grounds to dismiss claims against German companies in favor of resolution through the Foundation. *E.g.*, *In re Nazi Era Cases Against German Defendants Litig.*, 196 F. App'x 93, 102 (3d Cir. 2006) (affirming dismissal based on the political question doctrine); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1240 (11th Cir. 2004) (affirming summary judgment for a German bank on international comity grounds); *see generally* Durkin, *supra* note 61 (criticizing courts for dismissing claims of Holocaust victims).

68. Lawrence Kill & Linda Gerstel, *Holocaust-Era Insurance Claims: Legislative, Judicial, and Executive Remedies*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY*, *supra* note 49, at 239, 239.

69. LAWRENCE S. EAGLEBURGER ET AL., *FINDING CLAIMANTS AND PAYING THEM: THE CREATION AND WORKINGS OF THE INTERNATIONAL COMMISSION ON HOLOCAUST ERA INSURANCE CLAIMS 8–9* (2007), available at http://www.naic.org/Releases/2007_docs/icheic_book_2007.pdf ("Insurance policies were either directly confiscated, or repurchased by their owners with the proceeds going into blocked accounts that were . . . subsequently seized by Nazi authorities.").

Holocaust-Era Insurance Claims (ICHEIC).⁷⁰ ICHEIC was charged with “establishing an international procedure for processing unpaid insurance policies held by victims of the Nazi regime.”⁷¹ The German Foundation Agreement incorporated ICHEIC, providing that ICHEIC would handle insurance-related claims.⁷² ICHEIC’s settlement fund came partly from German insurance companies and partly from the Foundation.⁷³ As of March 2007, ICHEIC had completed its mission, awarding \$306 million to some 48,000 claimants, and committing \$169 million to humanitarian and social welfare programs for Holocaust survivors around the world.⁷⁴

While the U.S. government was not a party to the Memorandum of Understanding that established ICHEIC, the executive branch nevertheless endorsed ICHEIC as a remedy, both through its acceptance of the German Foundation Agreement (which incorporated ICHEIC), and also in a similar subsequent agreement with the Austrian government.⁷⁵ But ICHEIC was criticized by many as inept,⁷⁶ and some U.S. courts, finding ICHEIC an inadequate alternate forum, explicitly refused to dismiss insurance-related actions.⁷⁷

70. *Id.* at 18–19.

71. Kai Hennig, *The Road to Compensation of Life Insurance Policies: The Foundation Law and ICHEIC*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 49, at 251, 251.

72. *Id.* at 252.

73. *Id.* at 251–52.

74. ICHEIC, About ICHEIC, <http://www.icheic.org/about.html> (last visited Mar. 4, 2010).

75. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421 (2003) (“[T]he national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures”); *Anderman v. Austria*, 256 F. Supp. 2d 1098, 1117 (C.D. Cal. 2003) (“[T]he executive branch’s position [is that these] claims . . . should be adjudicated within the claims procedure of [ICHEIC] . . .”).

76. See *Garamendi*, 539 U.S. at 432–33 (Ginsburg, J., dissenting) (criticizing ICHEIC’s shortcomings); Kill & Gerstel, *supra* note 68, at 241–48; Sidney Zabludoff, *ICHEIC: Excellent Concept but Inept Implementation*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 49, at 260, 260–67 (claiming ICHEIC was plagued by “inept management and governance”).

77. *E.g.*, *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 356 (S.D.N.Y. 2002) (“A private, nonprofit association is not entitled to the deference that is accorded a public adjudicative or administrative organ of a sovereign state.”); *In re Nazi Era Cases Against German Defendants Litig.*, Nos. 1337, 98-4104, Civ. 01-5862, 2002 WL 31454184, at *3 (D.N.J. June 5, 2002) (calling ICHEIC “a questionable alternative remedy” and refusing to dismiss claims).

D. Looted Art Litigation and U.S. Policy

From a legal standpoint, Holocaust victims seeking the return of works of art lost during the war face particular obstacles and disadvantages. For all the works of art repatriated to various European governments after the war,⁷⁸ many others were never recovered by the Allies, and their whereabouts remain unknown.⁷⁹ Some were auctioned off publicly by the Nazis or at their direction,⁸⁰ while others slipped more quietly into the international art market.⁸¹ Even assuming a work could be found, claimants may then face special problems of proof.⁸² While actual litigation between a museum and a claimant is relatively rare (most claims are resolved through private negotiations),⁸³ U.S. courts have seen a steady stream of claims for the restitution of works of art,⁸⁴ including claims for works in foreign collections.⁸⁵

The first Holocaust-related art lawsuit⁸⁶ in the United States was filed in 1996 against a Chicago collector in possession of a work by Edgar Degas.⁸⁷ The plaintiffs were the grandsons of Dutch

78. See PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., *supra* note 14, at SR-143; see also PALMER, *supra* note 9, at 124.

79. Nicholas, *supra* note 22, at 450–51.

80. See NICHOLAS, *supra* note 9, at 3–5 (describing a 1939 auction of art from German museums).

81. Nicholas, *supra* note 22, at 450–51.

82. ASS'N OF ART MUSEUM DIRS., ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS 2 (2007), available at http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf

("Ownership records are often incomplete, wartime documents may have been destroyed, and standards of record keeping have changed over time.")

83. For selected cases and their current statuses, see Stephen W. Clark, *World War II Restitution Cases*, in LEGAL ISSUES IN MUSEUM ADMINISTRATION 371, 371–400 (2009) (listing seventy-eight current and pending claims in the United States and abroad).

84. *Id.*

85. For example, following *Austria v. Altmann*, 541 U.S. 677 (2004), which held that the Foreign Sovereign Immunities Act could create jurisdiction over foreign governments in actions to recover for Holocaust-looted art, the Austrian government returned five paintings to a California resident, the niece of the Jewish Austrian collector who left the paintings behind when he fled Austria. Richard Bernstein, *Austrian Panel Backs Return of Klimt Works*, N.Y. TIMES, Jan. 17, 2006, at E3. Pending is a claim against the Spanish government for a painting allegedly extorted from the plaintiff's grandmother in 1939 in exchange for permission to leave Germany. *Cassirer v. Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, 580 F.3d 1048 (9th Cir. 2009), *reh'g granted*, 590 F.3d 981 (9th Cir. 2009) (en banc).

86. HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 49, at xiii.

87. *Goodman v. Searle*, No. 96-CV-6459 (N.D. Ill. dismissed Aug. 19, 1998) (Westlaw, Dockets, U.S. Dist. Ct. Ill., N'ern). The case was originally filed in New York, then transferred to the Northern District of Illinois. Complaint, *Goodman*,

Jews whose collection was seized by the Nazis, and who later died at Auschwitz and Theresienstadt.⁸⁸ Before trial, the parties agreed to divide ownership of the work, and it resides now in the Art Institute of Chicago.⁸⁹ The dispute garnered national attention and fueled awareness concerning the problem of looted art, including the realization that many works had likely ended up not only in U.S. private collections, but also in public museums.⁹⁰

As part of the post-Cold War revival of interest in the subject, Congress created a Presidential Advisory Commission on Holocaust Assets to “examine issues pertaining to the disposition of Holocaust-era assets in the [United States] before, during, and after World War II, and to make recommendations to the President on further action”⁹¹ The U.S. State Department convened the Washington Conference on Holocaust-Era Assets in 1998, assembling representatives of forty-four governments and numerous non-governmental organizations to share information and discuss solutions to the continuing problem of restoring lost property to the victims of the Holocaust and their heirs.⁹²

This conference produced the non-binding Washington Principles, outlining eleven concrete steps that included the goal of “expeditiously . . . achiev[ing] a just and fair solution” to the problem of Nazi-looted art.⁹³ Both leading up to and as a result of the Washington Conference, a number of domestic organizations took measures to facilitate claims for looted artwork.⁹⁴ These included then New York Governor George Pataki’s establishment of the Holocaust Claims Processing Office in 1997,⁹⁵ the

No. 96-CIV-5310 (S.D.N.Y. July 17, 1996); Consent Order, *Goodman*, No. 96-CIV-5310 (S.D.N.Y. Sept. 24, 1996).

88. *Dispute Over Degas Resolved: Museum to Get Painting Allegedly Taken by Nazis*, WASH. POST, Aug. 14, 1998, at D4.

89. *Id.* The plaintiffs’ lawyer acknowledged the settlement as “an elegant solution for a difficult problem” involving “two sets of victims:” the family originally dispossessed and the present-day good-faith purchaser. *Id.*

90. See Walter V. Robinson, *An Ignominious Legacy: Evidence Grows of Plundered Art in U.S.*, BOSTON GLOBE, Apr. 25, 1997, at A1.

91. U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611.

92. See WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS: PROCEEDINGS, *supra* note 8, at 949, 949–70 for a list of participants in the Washington Conference.

93. *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 8, at 972.

94. Stuart E. Eizenstat, *The Unfinished Business of the Unfinished Business of World War II*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 49, at 297, 308.

95. Monica S. Dugot, *The Holocaust Claims Processing Office: New York State’s Approach to Resolving Holocaust-Era Art Claims*, in HOLOCAUST RESTITUTION:

promulgation by professional museum organizations of recommended guidelines and policies for handling Holocaust-related claims,⁹⁶ efforts by U.S. museums to research and publish the ownership history of their collections,⁹⁷ and the increased use of international databases to record information about stolen art.⁹⁸

IV. Holocaust-Related Litigation in the Ninth Circuit: The Cases Leading to *Von Saher*

The line of Ninth Circuit cases that culminates in *Von Saher* is a microcosm of the broader landscape of Holocaust-related litigation, implicating all four types of claims described above, as well as the range of limits on state and judicial resolution of such claims. *Deutsch v. Turner*⁹⁹ involved a Hungarian Jew who, with his brother, became a Nazi prisoner in 1944 and was forced to work as a slave laborer for German industry.¹⁰⁰ In 2000, pursuant to a then-new California statute,¹⁰¹ *Deutsch* sued the U.S. subsidiaries of a German corporation for personal injuries and the wrongful death of his brother.¹⁰² The district court dismissed the case as presenting a nonjusticiable political question.¹⁰³ The Ninth

PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 49, at 271, 272.

96. See, e.g., AM. ASS'N OF MUSEUMS, *supra* note 11; ASS'N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE SPOILATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1945) (1998), <http://www.aamd.org/papers/guideln.php> (outlining museums' self-imposed recommendations for handling art associated with Holocaust and World War II transactions); Press Release, Int'l Council of Museums, ICOM Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners (Jan. 14, 1999) (*available at* <http://icom.museum/worldwar2.html>) (publicizing museums' good faith efforts to research ownership and return artwork to its proper owners).

97. See Nazi-Era Provenance Internet Portal, <http://www.nepip.org> (last visited Feb. 17, 2010). The Portal is a searchable database of works of art that changed hands in Europe during the war, from the collections of 166 participating museums. *Id.* The database was created by the American Association of Museums in response to the Washington Principles' direction to create a centralized registry of information. See Ass'n of Art Museum Dirs., Object Registry, <http://aamdobjectregistry.org/Nazi-Era> (last visited Mar. 4, 2010).

98. See International Council of Museums, <http://icom.museum/spoliation.html#databases> (last visited Mar. 4, 2010) (listing online databases that hold information on looted art).

99. 324 F.3d 692 (9th Cir. 2003).

100. *Id.* at 704.

101. CAL. CIV. PROC. CODE § 354.6 (West 2006) (creating a private right of action for World War II slave labor victims and extending the statute of limitations to the end of 2010), *invalidated by* *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003).

102. *Deutsch*, 324 F.3d at 704.

103. See *Deutsch v. Turner*, No. CV 00-4405, 2000 WL 33957691 (C.D. Cal. Aug. 25, 2000), *aff'd*, 317 F.3d 1005 (9th Cir. 2003), *amended and superseded on denial of reh'g by* 324 F.3d 692. The Court's reasoning mirrored that of *Baker v. Carr*, 369 U.S. 186, 210 (1962). See *supra* notes 32–34 and accompanying text.

Circuit Court of Appeals, although clearly troubled by Deutsch's plight and the injustice he had suffered, agreed that the action should be dismissed, and "reluctantly" affirmed.¹⁰⁴ Rather than finding a political question, however, the Ninth Circuit Court invalidated the California statute on foreign affairs preemption grounds.¹⁰⁵ Because the Supreme Court had recently granted certiorari in *American Insurance Ass'n v. Garamendi*,¹⁰⁶ which implicated the same broad issue, the *Deutsch* court stayed its mandate pending *Garamendi's* outcome.¹⁰⁷

Garamendi involved a challenge by a group of U.S. and European insurance companies to another California law, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA).¹⁰⁸ HVIRA sought to facilitate Holocaust victims' recovery of assets by requiring insurers doing business in California to disclose information about policies in effect in Europe between 1920 and 1945.¹⁰⁹ The district court granted the plaintiffs a preliminary injunction on the grounds that HVIRA was likely unconstitutional.¹¹⁰ The Ninth Circuit Court of Appeals rejected the argument that HVIRA was preempted by the foreign affairs power,¹¹¹ but remanded for a determination of possible due process violations.¹¹² After remand, on the second appeal, the Court reiterated its holding that foreign affairs preemption did not apply,¹¹³ and the Supreme Court granted certiorari to address the question.¹¹⁴ The Supreme Court reversed, in a 5-4 decision, holding that HVIRA was preempted by the foreign affairs power.¹¹⁵ The Court relied in part on the fact that the German Foundation Agreement, as well as the subsequent separate executive agreement between the United States and Austria,¹¹⁶

104. *Deutsch*, 324 F.3d at 704.

105. *Id.* at 708–16.

106. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), *rev'g* *Gerling Global Reins. Co. v. Low*, 296 F.3d 832 (9th Cir. 2002).

107. *Deutsch*, 324 F.3d at 703.

108. *Garamendi*, 539 U.S. at 412, 420, *invalidating* CAL. INS. CODE §§ 13800–07 (West 2006).

109. CAL. INS. CODE § 13804, *invalidated by Garamendi*, 539 U.S. at 412, 420.

110. *Garamendi*, 539 U.S. at 412.

111. *Id.* (citing *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001)).

112. *Gerling*, 240 F.3d at 754.

113. *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002).

114. *Garamendi*, 539 U.S. at 413.

115. *Id.* at 413–20.

116. *See supra* note 75 and accompanying text.

provided specifically that ICHEIC was the agreed upon remedy for Holocaust-era insurance claims.¹¹⁷ Despite the fact that this direct conflict between an expressed federal policy and the statute at issue was sufficient to find express preemption,¹¹⁸ the Court's analysis relied heavily on *Zschernig*, and *Garamendi* has consequently been interpreted as an endorsement of the dormant foreign affairs preemption doctrine.¹¹⁹

Shortly thereafter, the Ninth Circuit Court of Appeals invoked the political question doctrine to dismiss claims of Holocaust survivors in *Alperin v. Vatican Bank*.¹²⁰ *Alperin* involved a suit against the Vatican Bank for property and human rights claims alleging crimes committed under the Ustasha Regime, a Nazi puppet government in Croatia.¹²¹ The property claims were related to gold and other assets allegedly misappropriated during the war.¹²² The human rights claims alleged war crimes, including forcing plaintiffs to work as slave laborers.¹²³ As in *Deutsch*, the district court in *Alperin* applied *Baker* and dismissed all claims as presenting nonjusticiable political questions.¹²⁴ The Ninth Circuit Court of Appeals reversed in part and affirmed in part, holding that only the human rights claims warranted dismissal as presenting nonjusticiable political questions.¹²⁵ On remand, the district court dismissed the property claims based on the Foreign Sovereign Immunities Act, and the Ninth Circuit Court of Appeals affirmed.¹²⁶

117. *Id.* at 406–08.

118. *Id.* at 425.

119. *Id.* at 439 (Ginsburg, J., dissenting) (“The Court’s analysis draws substantially on *Zschernig v. Miller* . . . I would not resurrect that decision here.”); *Von Saher v. Norton Simon Museum*, 578 F.3d 1016, 1025 (9th Cir. 2009) (citing *Garamendi* as an application of *Zschernig*), *amended and superseded on denial of reh’g en banc* by No. 07-56691, 2010 WL 114959 (9th Cir. Jan. 14, 2010); see Nicholas P. Martinelli, *Constitutional Law—Foreign Affairs Power Preempts California Law: National Government to Resolve Holocaust-Era Insurance Claims—American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), 38 SUFFOLK U. L. REV. 945 (2005) (arguing that the Court’s reliance on *Zschernig* was misplaced).

120. *Alperin v. Vatican Bank (Alperin II)*, 410 F.3d 532 (9th Cir. 2005), *aff’g* *Alperin v. Vatican Bank*, C99-4941, 2003 WL 21303209 (N.D. Cal. May 29, 2003), *aff’g in part and rev’g in part* 242 F.Supp.2d 686 (N.D. Cal. 2003), *amending* 405 F.3d 727 (9th Cir. 2005).

121. *Id.* at 538.

122. *Id.* at 543.

123. *Id.* at 543–44.

124. *Alperin*, 242 F. Supp. 2d at 695, *rev’d in part and aff’d in part*, *Alperin II*, 410 F.3d 532.

125. *Alperin II*, 410 F.3d at 548, 558–59.

126. *Alperin v. Vatican Bank*, No. 08-16060, 2009 WL 5196077 (9th Cir. Dec. 29, 2009) (mem.), *aff’g* No. C-99-04941, 2007 WL 4570674 (N.D. Cal. Dec. 27, 2007),

V. *Von Saher v. Norton Simon Museum*

The historical events that culminated in *Von Saher* are unusually well-documented and demonstrate the myriad complex issues implicated by Holocaust-related art claims.

A. *History of the Disputed Paintings*

Adam and *Eve* are two large and important panel paintings by the sixteenth century German painter Lucas Cranach the Elder.¹²⁷ Painted as a pair around 1530, most likely for a member of the Saxon court of Frederick III,¹²⁸ their subsequent whereabouts were undocumented until 1927, when they were found hidden in a church in Kiev, Ukraine.¹²⁹ After the pictures surfaced, the Bolshevik (later Soviet) government that seized power in the Communist revolution of 1917–18 “nationalized” the paintings as state property.¹³⁰ In 1931, the Soviets consigned both paintings, along with more than 250 other works, together labeled as “the Stroganoff Collection Leningrad,” to a Berlin auction house.¹³¹

The Stroganoffs were art collectors and one of Russia’s preeminent noble families.¹³² They fled Russia in the wake of the revolution, and the Soviet government nationalized their property, including much of their art collection.¹³³ Upon learning of the pending 1931 Berlin auction, members of the exiled family formally and publicly protested the sale, but were unsuccessful in

amended in part by No. 08-16060, 2010 WL 489495 (9th Cir. Feb. 10, 2010).

127. Norton Simon Museum, Online catalogue record for *Eve*, http://www.nortonsimon.org/collections/browse_title.php?id=M.1991.1.P (last visited Feb. 15, 2010); Norton Simon Museum, Online catalogue record for *Adam*, <http://www.nortonsimon.org/collections/highlights.php?period=14H&resultnum=27> (last visited Mar. 18, 2010).

128. Norton Simon Museum, Online catalogue record for *Eve*, http://www.nortonsimon.org/collections/browse_title.php?id=M.1991.1.P (last visited Feb. 15, 2010); Norton Simon Museum, Online catalogue record for *Adam*, <http://www.nortonsimon.org/collections/highlights.php?period=14H&resultnum=27> (last visited Mar. 18, 2010).

129. Complaint at 8, Norton Simon Art Found. v. Von Saher, No. CV07-02850 (C.D. Cal. May 1, 2007) [hereinafter Norton Simon Complaint].

130. *Id.*

131. Muchnic, *supra* note 4, at D14.

132. See generally Sergei Kuznetsov, *Family Chronicle*, in STROGANOFF: THE PALACE AND COLLECTIONS OF A RUSSIAN NOBLE FAMILY at 21, 21–46 (Penelope Hunter-Stiebel ed., 2000); Militsa Korshunova, *The Stroganoff Collectors*, in STROGANOFF: THE PALACE AND COLLECTIONS OF A RUSSIAN NOBLE FAMILY at 77, 77–87 (Penelope Hunter-Stiebel ed., 2000) (chronicling the history of the Stroganoff family and the accumulation of their prodigious art collection).

133. Norton Simon Complaint, *supra* note 129, at 9.

halting it.¹³⁴ At the sale, Jacques Goudstikker, an Amsterdam Jew, the *Von Saher* plaintiff's father-in-law and by then a successful art dealer, purchased *Adam* and *Eve* for his gallery.¹³⁵ *Adam* and *Eve* were two of the approximately 1400 works of art still in Goudstikker's gallery inventory on May 14, 1940, when Goudstikker fled Nazi-occupied Holland for England with his wife and infant son.¹³⁶ Goudstikker died en route to England in a freak accident involving a fall.¹³⁷ Within weeks of Goudstikker's death, Hitler's second in command, Hermann Göring, had visited the abandoned gallery and "purchased" its inventory, including *Adam* and *Eve*, for himself, while leaving the business and various other real and personal property with an associate.¹³⁸ After the war, the Allies recovered the paintings in Germany among hundreds of others that Göring had amassed during the conflict, and repatriated them to the Dutch government.¹³⁹

B. Adjudication of Claims by the Dutch Government

Even before the end of the war, the Dutch government, from its exile in London, had issued a royal order to facilitate the recovery and restitution of looted property, and established a council to administer claims.¹⁴⁰ After the war, Jacques Goudstikker's widow, Desi, pressed claims for the return of the property that had been taken, and recovered a portion of it—but not the paintings taken by Göring—from the Dutch government in

134. *\$157,080 Paid in Berlin for Two Van Dycks: Stroganoff Collection Auction Nets \$476,000 for First Day—Princess Fails to Halt Sale*, N.Y. TIMES, May 13, 1931, at 22.

135. Muchnic, *supra* note 4, at D14.

136. *Id.*; NICHOLAS, *supra* note 9, at 84.

137. NICHOLAS, *supra* note 9, at 84. Goudstikker and his wife were escaping a Nazi invasion of the Netherlands via boat, but were denied entrance to Great Britain. *Id.* Before the ship could sail again, Goudstikker went on a walk to "have some fresh air" on the deck, where he "missed his footing and [fell] to his death through an uncovered hatch." *Id.* See also Yehudit Shendar & Niv Goldberg, *The Insatiable Pursuit of Art: The Jacques Goudstikker Collection and Nazi Art Looting*, in RECLAIMED: PAINTINGS FROM THE COLLECTION OF JACQUES GOUDSTIKKER at 35, 39 (Peter C. Sutton ed., 2008).

138. Lawrence M. Kaye, *The Restitution of the Goudstikker Collection*, in RECLAIMED: PAINTINGS FROM THE COLLECTION OF JACQUES GOUDSTIKKER, *supra* note 137, at 55, 57.

139. *Id.* at 57–58.

140. Besluit van 17 September 1944, houdende vaststelling van het Besluit herstel rechtsverkeer [Order for the Restoration of Legal Rights], Stb. E100 (1944) (Neth.); see also PALMER, *supra* note 9, at 124; Anna B. Rubin, Dir. Holocaust Claims Processing Office, N.Y. State Banking Dep't, Address at the Holocaust Era Assets Conference: Presumptions: Applying Lessons Learned from Compensation Programs (June 26–30, 2009) (transcript available at <http://www.banking.state.ny.us/sp090627.pdf>).

1952.¹⁴¹ Subsequently, the Dutch government sold some unclaimed artworks, including some of the Goudstikker-owned paintings that Göring had taken.¹⁴² In 1961, George Stroganoff-Scherbatoff, the heir to the Stroganoff dynasty and a naturalized U.S. citizen, petitioned the Dutch government for the return of *Adam* and *Eve* on the basis of his family's dispossession by the Soviet government.¹⁴³ In 1966, the Dutch government settled his claim, giving the paintings to Stroganoff-Scherbatoff in exchange for a monetary payment.¹⁴⁴ Stroganoff-Scherbatoff, in turn, sold the paintings through a dealer to the Norton Simon Museum in 1970 and 1971.¹⁴⁵

Desi Goudstikker and her son Edo both died in 1996, leaving Edo's widow, Marei Von Saher, as Jacques Goudstikker's only surviving heir.¹⁴⁶ In 1998, responding to the Dutch government's renewed receptiveness to Holocaust-era claims, Von Saher made claims for all Goudstikker artworks still in the hands of the Dutch government.¹⁴⁷ In 2006, after protracted negotiations and changes in Dutch policy, the Dutch government returned 200 works to Von Saher.¹⁴⁸

C. Von Saher's Claim Against the Museum

The conflict between Marei Von Saher and the Norton Simon Museum began in February 2001, when she contacted the museum and asserted her ownership of *Adam* and *Eve*.¹⁴⁹ The museum refused to concede its ownership but agreed to enter into

141. Norton Simon Complaint, *supra* note 129, at 17. The significance of the 1952 settlement for Von Saher's present claim is disputed. According to the Norton Simon's complaint, Desi Goudstikker, on advice from her attorneys, decided not to pursue restitution of the paintings purchased by Göring, and under the Dutch system, her claim had lapsed in 1951. *Id.* at 13–17. Von Saher's attorney, on the other hand, contends that the Dutch government's "legalistic, bureaucratic, cold, and often even callous" handling of post-war claims made it impossible for Desi Goudstikker to recover all of her property. Kaye, *supra* note 138, at 58.

142. Answering Brief of Defendants-Appellees at 16, Von Saher v. Norton Simon Museum, 578 F.3d 1016 (9th Cir. 2009) (No. 07-56691). See also ORIGINS UNKNOWN ADVISORY COMM., FINAL REPORT: RECOMMENDATION 5(b) (2004), available at <http://www.herkomstgezocht.nl/eng/rapportage/index.html> (unpaginated English translation as well as paginated Dutch original) (acknowledging the 1950s auctions and the impossibility of accurately accounting for works sold).

143. Norton Simon Complaint, *supra* note 129, at 18.

144. *Id.*

145. *Id.* at 19.

146. Complaint at 8, Von Saher v. Norton Simon Museum, No. CV07-02866 (C.D. Cal. May 1, 2007) [hereinafter Von Saher Complaint].

147. Kaye, *supra* note 138, at 59.

148. *Id.*

149. Norton Simon Complaint, *supra* note 129, at 29.

mediation talks.¹⁵⁰ Following the breakdown of these talks, the museum and Von Saher filed simultaneous actions in district court, each side seeking, among other things, a declaratory judgment affirming ownership.¹⁵¹

Von Saher brought her claim under section 354.3 of the California Code of Civil Procedure,¹⁵² which provided that the owners of works of art taken by the Nazis, or the owner's heirs, could bring actions against museums and galleries to recover those works until the end of 2010.¹⁵³ The district court, relying on *Deutsch v. Turner*,¹⁵⁴ dismissed Von Saher's claims with prejudice, finding the statute preempted by the dormant foreign affairs doctrine and the claims time-barred under the normal statute of limitations for the recovery of stolen property.¹⁵⁵ On appeal, the Ninth Circuit Court of Appeals held that, while section 354.3 posed no direct conflict with any current federal policy,¹⁵⁶ it was nevertheless subject to "field" preemption analysis because the statute did not concern a "traditional state responsibility."¹⁵⁷ Under a field preemption analysis, any intrusion into the realm of foreign affairs, a field occupied exclusively by the federal government, would result in preemption.¹⁵⁸ Despite holding section 354.3 preempted, the Court of Appeals questioned the district court's holding as to the validity of the claim under the normal California statute of limitations and remanded the case for further proceedings.¹⁵⁹ The dissent, however, argued that the statute did in fact concern a traditional state responsibility, and that "conflict," rather than "field," preemption should apply.¹⁶⁰ Under *Garamendi*, the dissent argued, a conflict preemption

150. *Id.*

151. *Id.*; Von Saher Complaint, *supra* note 146.

152. Section 354.3 of the California Code of Civil Procedure is substantially similar, but not identical, to section 354.6, the statute held unconstitutional in *Deutsch*. See full text and discussion, *infra* Part VI.B.

153. CAL. CIV. PROC. CODE § 354.3 (West 2006), *invalidated by* Von Saher v. Norton Simon Museum of Art, No. 07-56691, 2010 WL 114959 (9th Cir. 2010) (en banc); Von Saher v. Norton Simon Museum, No. CV 07-2866-JFW, 2007 WL 4302726, at *1 (C.D. Cal. Oct. 18, 2007), *aff'd in part, rev'd in part* No. 07-56691, 2010 WL 114959 (9th Cir. Jan. 14, 2010) (en banc).

154. See *supra* notes 99–107 and accompanying text.

155. *Von Saher*, 2007 WL 4302726, at *3–4.

156. Von Saher v. Norton Simon Museum, 578 F.3d 1016, 1025 (9th Cir. 2009), *amended and superseded on denial of reh'g en banc by* No. 07-56691, 2010 WL 114959 (9th Cir. Jan. 14, 2010).

157. *Id.* at 1027.

158. *Id.* at 1029.

159. *Id.* at 1031.

160. *Id.* at 1031–32 (Pregerson, C.J., dissenting).

analysis would balance a state's interest in performing a traditional state responsibility against the impact of that state action on foreign relations.¹⁶¹ The dissent would have found that the state interest outweighed the impact on foreign relations and reversed the district court.¹⁶²

VI. *Von Saher* and the Misuse of Dormant Foreign Affairs Preemption

Even if the claim can be brought within the regular statute of limitations, the Ninth Circuit Court of Appeals' reasoning in *Von Saher v. Norton Simon Museum* seems to require that it ultimately be dismissed on other grounds. The case involves reexamining and passing judgment upon a post-war restitution decision made by a sovereign nation with the implicit endorsement of the U.S. government, and as such either poses a nonjusticiable political question or is unreviewable under the act of state doctrine.¹⁶³ These problems, however, have nothing to do with any special statute of limitations, rather, they arise from the particular facts of *Von Saher*.¹⁶⁴ Comparing the different claims at issue in *Deutsch*, *Garamendi*, and *Von Saher*¹⁶⁵—and the differing levels of federal involvement in the resolution of slave labor, insurance, and art claims¹⁶⁶—it is clear that the dormant foreign affairs preemption doctrine should not apply to California Code of Civil Procedure section 354.3. The Court should have left the special statute of limitations created by statute intact and dismissed the case for prudential reasons.

A. *Art Cases Present Different Foreign Policy Issues than Banking, Forced Labor, or Insurance Claims*

The Ninth Circuit Court of Appeals acknowledged in *Von Saher* that the federal government's policy regarding the recovery of works of art misappropriated during World War II has not been

161. *Id.*; see *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003).

162. *Von Saher*, 578 F.3d at 1031–32 (Pregerson, C.J., dissenting). See also *Zschernig v. Miller*, 389 U.S. 429, 458–59 (1968) (Harlan, J., concurring in the result) (“Prior decisions have established that in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.”).

163. See *supra* Parts II.A–B.

164. See *supra* Parts V.A–B.

165. See *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Garamendi*, 539 U.S. 396; *Von Saher*, 578 F.3d 1016.

166. See *supra* Parts III.B–D, IV.A.

so clearly articulated as to warrant preempting state action in this arena on the basis of any direct conflict with federal policy.¹⁶⁷ Federal policy with respect to Holocaust-era art claims has never been unequivocally stated—as with the slave labor and insurance claims—nor is it inextricably bound up with foreign policy—as with the banking claims.¹⁶⁸ Art claims, unlike the forced labor, insurance, and banking claims,¹⁶⁹ do not lend themselves to a government-driven mass resolution through a vehicle like the German Foundation Agreement or ICHEIC.¹⁷⁰ Because artwork has been dispersed throughout the world, there is no single present possessor, government, or industry that can be held accountable.¹⁷¹ The rights and obligations of innocent parties now in possession of disputed works are implicated, including the obligations of museums—as fiduciaries holding their collections in trust for the public—to diligently investigate claims.¹⁷² Further, the U.S. government's actions in the late 1990s¹⁷³ do not amount to a clear foreign policy position regarding the resolution of art claims, but instead are merely a recognition that works should be returned where appropriate.¹⁷⁴ The convening of the Washington Conference¹⁷⁵ was a major undertaking, and the Washington Principles have been influential in shaping domestic behavior and policy.¹⁷⁶ The Principles are non-binding, however, and express no unequivocal preference for a particular method or forum for claim resolution—to the contrary, “the Conference recognizes that

167. *Von Saher*, 578 F.3d at 1024–25 (“[Section 354.3] does not . . . conflict with any current foreign policy espoused by the Executive Branch.”).

168. *See supra* Part III.

169. *Id.*

170. *See supra* notes 61–62, 65–70, and accompanying text.

171. In addition, the private status of most U.S. museums precludes government intervention. J. Christian Kennedy, Special Envoy for Holocaust Issues, Remarks: The Role of the United States Government in Art Restitution (Apr. 23, 2007) (transcript available at http://germany.usembassy.gov/kennedy_speech.html) (“While the government can urge institutions to participate voluntarily in programs [facilitating resolution of claims], the government does not have any leverage to force compliance . . .”).

172. AM. ASS'N OF MUSEUMS, *supra* note 11, at 7 (“Museums . . . hold their collections in the public trust . . . Their stewardship duties and their responsibilities to the public they serve require that any decision to . . . dispose of objects be taken only after the completion of appropriate steps and careful consideration.”).

173. *See supra* Part III.D.

174. *See Kennedy, supra* note 171 (“We continue as a government to urge that foreign governments and institutions observe the Washington Principles and return artworks to their rightful owners.”).

175. *See supra* Part III.D.

176. *Eizenstat, supra* note 94, at 308.

among participating nations there are differing legal systems and that countries act within the context of their own laws.”¹⁷⁷ The latest global conference on the subject of Holocaust-era assets¹⁷⁸ reaffirmed the international community’s commitment to the Washington Principles, but again did not call for the creation of any kind of international, non-judicial forum for the resolution of looted art claims.¹⁷⁹ Instead, the Working Group on Looted Art recommended that those countries that had not already done so should establish “national claims procedures for fair and just solutions encompassing decisions on their merits, i.e., on a moral basis, and not on technical defences such as the passage of time.”¹⁸⁰

The federal government’s involvement in the international resolution of Holocaust-era banking, forced labor, and insurance claims, by contrast, included the articulation of and commitment to a particular position with respect to other nations. In the Swiss bank litigation settlement negotiations, that position put the federal government at odds with several individual states.¹⁸¹ In the case of the forced labor and insurance claims, the federal government endorsed specific nonjudicial remedies, and courts recognized the federal interest in recourse to the German Foundation and ICHEIC, respectively, as official foreign policy.¹⁸²

B. Section 354.3 is Not Facially Unconstitutional

Section 354.3 of the California Code of Civil Procedure provides that the owners of works of art taken by the Nazis, or the owners’ heirs, can bring actions against museums and galleries to recover those works until the end of 2010.¹⁸³ The Ninth Circuit

177. *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 8, at 971.

178. The Holocaust Era Assets Conference convened June 26–30, 2009, in Prague, Czech Republic. Holocaust Era Assets Conference, Prague, Czech Rep., June 26–30, 2009, <http://www.holocausteraassets.eu/> (last visited Feb. 16, 2010). Then-Secretary of State Stuart E. Eizenstat, the official envoy on Holocaust issues in the Clinton administration, who was deeply involved in the German Foundation negotiations, led the U.S. delegation. *Id.*; see *MUTUAL RESPONSIBILITY*, *supra* note 62, at 56–64.

179. HOLOCAUST ERA ASSETS CONFERENCE, TEREZIN DECLARATION 4–5 (2009), available at http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf.

180. HOLOCAUST ERA ASSETS CONFERENCE, EXPERT CONCLUSIONS 19 (2009), available at http://www.holocausteraassets.eu/files/200000201-62a0caabb3/Expert_Conclusions.pdf.

181. See *supra* Part III.A.

182. See *supra* Parts III.B–C; see also *supra* note 75.

183. CAL. CIV. PROC. CODE § 354.3 (West 2006), *invalidated by Von Saher v.*

Court of Appeals in *Von Saher*, relying on its earlier holding in *Deutsch* and applying the doctrine of dormant foreign affairs preemption, invalidated the statute.¹⁸⁴ Considering the nature of Holocaust-era art claims compared to slave labor claims, however, section 354.3 does not suffer from the same constitutional shortcomings as section 354.6, the statute invalidated in *Deutsch*.¹⁸⁵

Section 354.3 provides, in relevant part:

(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any [museum or gallery] described

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.¹⁸⁶

The Ninth Circuit Court of Appeals acknowledged in *Von Saher* that in theory the purpose of the statute—the resolution of property claims—could represent a legitimate state interest and traditional state function.¹⁸⁷ But the court found that the statute was so broad in scope as to belie its purported goal of protecting the property rights of California residents, and thus it could no longer claim to address a “traditional state responsibility.”¹⁸⁸ Further, the court found that the statute shared the same underlying “fatal” motive as the *Deutsch* statute, i.e., “redress[ing] wrongs committed in the course of the Second World War.”¹⁸⁹ As such, the statute encroached impermissibly “into a field occupied exclusively by the federal government.”¹⁹⁰ The *Von Saher* dissent, on the other hand, argued that because the regulation of property is a traditional state function, state action should not be preempted absent a clear conflict with federal policy.¹⁹¹

Norton Simon Museum of Art, No. 07-56691, 2010 WL 114959 (9th Cir. Jan. 14, 2010) (en banc).

184. *Von Saher v. Norton Simon Museum*, 578 F.3d 1016, 1027–29 (9th Cir. 2009), *amended and superseded on denial of reh'g en banc* by No. 07-56691, 2010 WL 114959 (9th Cir. Jan. 14, 2010).

185. CAL. CIV. PROC. CODE § 354.6 (West 2006), *invalidated by Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003).

186. CAL. CIV. PROC. CODE § 354.3, *invalidated by Von Saher*, 2010 WL 114959. Section 354.3 is substantially similar, but not identical, to section 354.6, the statute held unconstitutional in *Deutsch*. CAL. CIV. PROC. CODE § 354.6, *invalidated by Deutsch*, 324 F.3d at 692.

187. *Von Saher*, 578 F.3d at 1025–26.

188. *Id.* at 1027.

189. *Id.* (quoting *Deutsch*, 324 F.3d at 712).

190. *Id.* at 1029.

191. *Id.* at 1032 (Pregerson, C.J., dissenting) (“Because California has a ‘serious

While it is theoretically possible that a modern-day museum or gallery might have some direct responsibility for the original wartime confiscation, theft, forced sale, or other misappropriation of a work in its collection, section 354.3 is far more likely to encompass innocent purchasers and donation recipients that, like the Norton Simon Museum, either had no involvement with the misappropriation or believed that restitution had been made prior to acquisition.¹⁹² Moreover, with section 354.3's definition of "Holocaust-era artwork" as any work "taken as a result of Nazi persecution," and its failure to exclude works taken, restituted, and then lawfully sold or donated, the statute would technically also encompass completely spurious restitution claims brought by persons who had objects returned to them and then willingly parted with the works of art.¹⁹³ It seems highly unlikely that the California legislature meant to create such an absurd cause of action. Rather, the statute is procedural in nature, "extend[ing] the statute of limitations for claims against museums and galleries currently in possession of [Holocaust-era artworks]."¹⁹⁴

The statute at issue in *Deutsch*, on the other hand, sought to create a substantive right, and arguably failed under either a conflict or field preemption analysis.¹⁹⁵ Section 354.6 directly conflicts with expressed federal foreign policy providing that the preferred remedy for Holocaust-era slave labor claims was the mechanism established by the German Foundation agreement.¹⁹⁶ Furthermore, by targeting former wartime enemies, the statute at issue in *Deutsch* plainly addresses an area of federal competence.¹⁹⁷ As the *Deutsch* court reasoned, California "sought to create its own resolution to a major issue arising out of the war—a remedy for wartime acts that California's legislature believed had never been fairly resolved,"¹⁹⁸ and that remedy was

claim to be addressing a traditional state responsibility,' it is clear that *Garamendi* requires us to apply conflict preemption, not field preemption.").

192. Norton Simon Complaint, *supra* note 129, at 19–20.

193. See also CAL. CIV. PROC. CODE § 354.3(2) (West 2006), *invalidated* by *Von Saher v. Norton Simon Museum of Art*, No. 07-56691, 2010 WL 114959 (9th Cir. 2010) (en banc). Compare *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 8, at 971 (combining the painstakingly qualifying phrase "confiscated by the Nazis" with "and not subsequently restituted") with AM. ASS'N OF MUSEUMS, *supra* note 11 (consistently using "unlawfully appropriated" and "without subsequent restitution").

194. Brief for Appellant at 16, *Von Saher*, 578 F.3d 1016 (No. 07-56691); *Von Saher*, 578 F.3d at 1032 (Pregerson, C.J., dissenting).

195. *Deutsch v. Turner*, 324 F.3d 692, 715–16 (9th Cir. 2003).

196. *Id.* at 713–14.

197. *Id.* at 712.

198. *Id.*

an impermissible intrusion on “the federal government’s exclusive power to make and resolve war, including the procedure for resolving war claims.”¹⁹⁹ The *Von Saher* dissent distinguished slave labor claims under section 354.6 from art claims under section 354.3, agreeing with Von Saher’s argument that, because the latter statute neither targeted former enemies of the United States, nor sought to provide war reparations, it did not intrude on any federal prerogative.²⁰⁰

C. Dormant Foreign Affairs Preemption Doctrine Is Inapplicable to Section 354.3

Between 1968, when the Supreme Court articulated the principles of dormant foreign affairs preemption in *Zschernig*, and 2003, when it decided *Garamendi*, the Court never invalidated a state action based on dormant foreign affairs preemption.²⁰¹ Nor was the 5-4 *Garamendi* decision a full embrace of the doctrine.²⁰² In *Garamendi*, there was ample evidence to support the finding that the federal government, acting through the executive branch, had established a clear policy with respect to the resolution of Holocaust-era insurance claims.²⁰³ This evidence alone, in the majority’s opinion, sufficed to invalidate HVIRA, the California disclosure statute at issue.²⁰⁴ Because the Court found that HVIRA stood as an obstacle to the accomplishment of the executive branch’s clearly stated policy and practice, the Court found it unnecessary to reach the question of whether, in the absence of any clearly articulated federal policy, a state action that addresses a traditional state responsibility must nevertheless be invalidated.²⁰⁵

199. *Id.*

200. *Von Saher v. Norton Simon Museum*, 578 F.3d 1016, 1032 (Pregerson, C.J., dissenting) (“I fail to see how [this statute] intrudes on the federal government’s power to make and resolve war.”), *amended and superseded on denial of reh’g en banc* by No. 07-56691, 2010 WL 114959 (9th Cir. Jan. 14, 2010).

201. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting) (“We have not relied on *Zschernig* since it was decided”); *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 752 (9th Cir. 2001) (“[T]he Supreme Court has not applied [dormant foreign affairs preemption] in more than 30 years, since *Zschernig*”), *rev’d sub nom. Garamendi*, 539 U.S. 396.

202. *Garamendi*, 539 U.S. at 400.

203. *Id.* at 420–25 (detailing federal interest in and endorsement of ICHEIC as an exclusive remedy).

204. *Id.* at 425 (“The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.”).

205. *Id.* at 419–20.

Thus, *Garamendi* did not shed much light on how to balance legitimate, articulated state interests against potential harm to theoretical, unarticulated federal interests.²⁰⁶ In the decision *Garamendi* reversed, the Ninth Circuit Court of Appeals had held that *Zschernig* should not be applied to statutes that are not facially unconstitutional.²⁰⁷ The Court of Appeals had applied a balancing test and found that HVIRA did not have enough of an impact on foreign relations to invoke the foreign affairs preemption doctrine, nor did it have “the potential to ‘disrupt and embarrass’ the federal government in the field of foreign relations.”²⁰⁸ Similarly, the *Garamendi* dissent found *Zschernig* inapposite, particularly where the state action or policy at issue “takes no position on any contemporary foreign government and requires no assessment of any existing foreign regime.”²⁰⁹ The *Garamendi* dissent further noted that, absent any executive agreement or other positive law specifically precluding or extinguishing claims, “[i]t remains uncertain . . . whether even litigation on Holocaust-era insurance claims must be abated in deference to the German Foundation Agreement or the parallel agreements with Austria and France.”²¹⁰ The dissent saw no reason to invalidate HVIRA in light of the fact that the German Foundation Agreement and the subsequent executive agreement with Austria made no mention of disclosure statutes like HVIRA, nor did they take the opportunity to expressly preempt them, even though HVIRA was already in force when the executive agreements were entered into.²¹¹ Section 354.3 is not facially unconstitutional and is thus appropriately evaluated without regard to *Zschernig*.²¹²

D. Section 354.3 is Consistent with Minimal Existing Federal Policy Related to Holocaust-Era Art Claims

Altering the statute of limitations on Holocaust-era art claims against present possessors who are unrelated to the original wrongdoers is an action that, on its face, has no effect on foreign relations, and that, as applied, would implicate foreign relations only in rare cases. For example, foreign relations might

206. *Id.* at 419 n.11.

207. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 753 (9th Cir. 2001).

208. *Id.* at 751.

209. *Garamendi*, 539 U.S. at 440 (Ginsburg, J., dissenting).

210. *Id.* See *supra* note 75.

211. *Garamendi*, 539 U.S. at 441 (Ginsburg, J., dissenting).

212. See *supra* Part VI.B.

be affected when a claim is brought against a foreign sovereign or its agents,²¹³ or, as in *Von Saher*, when the particular claim turns on an evaluation of the act of a foreign sovereign.²¹⁴ Those cases may, when necessary, be dismissed on other grounds.²¹⁵ Section 354.3 does not threaten the federal government's ability to speak with one voice in foreign relations, and is arguably consistent with what little federal policy exists regarding resolution of Holocaust-era art claims.

While the federal government undoubtedly has the power to engage in foreign relations and to preempt states from doing so,²¹⁶ many legitimate state activities touch on foreign relations.²¹⁷ States regulate the conduct of visiting foreign nationals; states and large cities routinely send representatives to foreign countries to promote trade and tourism; numerous cities have established sister-city relationships with foreign cities; and state and local governments wield spending power in ways that both reflect and shape the behavior of foreign nations.²¹⁸ Commentators argue that not all such state behavior is, or should be, preempted,²¹⁹ and that in fact the federal government sometimes actively encourages states to engage in such relations.²²⁰

In the realm of Holocaust-era art claims, the closest thing to an articulation of federal policy is the non-binding Washington Conference Principles on Nazi-Confiscated Art from 1998,²²¹ as

213. *E.g.*, *Austria v. Altmann*, 541 U.S. 677 (2004); *Cassirer v. Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, 580 F.3d 1048 (9th Cir. 2009), *reh'g granted*, 590 F.3d 981 (9th Cir. 2009) (en banc).

214. *See infra* Part VI.E.

215. *See supra* Part II.

216. *See supra* Part II.C.

217. *See* Sarah H. Cleveland, Crosby and the "One-Voice" Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975, 994–98 (2001); Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, FOREIGN POL'Y, Spring 1992, at 158–59.

218. Cleveland, *supra* note 217, at 994–98; Shuman, *supra* note 217, at 158–59.

219. *E.g.*, Richard H. Bilder, *The Role of Cities and States in Foreign Relations*, 83 AM. J. INT'L L. 821, 830 (1989) (endorsing cooperative attitudes toward state and local involvement in foreign affairs); Shuman, *supra* note 217, at 177 ("To prohibit states and cities from acting in all areas touching on things foreign inevitably means . . . stripping localities of their traditional rights to zone, police, invest, and contract."). *Contra* Howard N. Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 563 (1993) ("[T]hese state and local efforts threaten to undermine the authority and effectiveness of United States' foreign policy.").

220. *See* Cleveland, *supra* note 217, at 1001 ("Despite the potential of state and local activities to provoke international conflict, Congress and the President have frequently tolerated, deferred to and in some cases abetted, such policies.").

221. *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 8, at 971.

reaffirmed in the Terezin Declaration of June 2009.²²² Broadly worded, the Washington Principles encourage parties to reach a “just and fair solution,” and do not specifically preclude the judicial resolution of claims.²²³ Although Principle XI urges that nations should “develop . . . alternative dispute resolution mechanisms for resolving ownership issues,”²²⁴ the United States has not created any sort of alternate forum for the resolution of looted art claims.²²⁵

As applied to museums—the target of the California Code of Civil Procedure section 354.3—a form of national policy is expressed in the guidelines promulgated by the American Association of Museums (AAM) and the Association of Art Museum Directors (AAMD), the private organizations responsible for the professional standards of U.S. art museums.²²⁶ Both the AAM and the AAMD consulted with the Presidential Commission on Holocaust Assets in preparation of its final report on Holocaust-era assets, and both were influenced by the Washington Principles in formulating their own guidelines.²²⁷ Both the AAM and the AAMD guidelines express a preference for alternative dispute resolution methods such as mediation.²²⁸ Neither forecloses the possibility of litigation, nor relieves museums of their fiduciary obligation to investigate the validity of claims before resolving them.²²⁹ Principle XI and the recommendations of some commentators notwithstanding,²³⁰ the creation of a national or international non-judicial forum for the resolution of Holocaust-era art claims is neither practical nor necessary. Museums take seriously the professional standards that govern their conduct and their ethical obligations to deal fairly with claimants; despite the precatory nature of the AAM and AAMD guidelines, many

222. See HOLOCAUST ERA ASSETS CONFERENCE, *supra* note 179, at 4–5.

223. *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 8, at 971.

224. *Id.*

225. See Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 230 (2006).

226. See *supra* note 96 and accompanying text.

227. AM. ASS'N OF MUSEUMS, *supra* note 11; ASS'N OF ART MUSEUM DIRS., *supra* note 82, at 2.

228. AM. ASS'N OF MUSEUMS, *supra* note 11; ASS'N OF ART MUSEUM DIRS, *supra* note 96, at II.E.3.

229. AM. ASS'N OF MUSEUMS, *supra* note 11; ASS'N OF ART MUSEUM DIRS, *supra* note 96, at II.

230. See Kelly Ann Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 385 (2000); Pollock, *supra* note 225, at 224.

museums have adopted and taken action pursuant to them.²³¹ Most of the meritorious claims against U.S. museums thus far have been resolved privately between the museum and the claimant.²³² Meritorious claims against private parties have also been successfully settled privately, or litigated in the claimant's favor.²³³ Those that go to trial, such as *Von Saher*, are the cases where private discussions or mediation have broken down.²³⁴

In fact, the statute of limitations has rarely been used to bar a Holocaust-era art claim against a museum.²³⁵ The AAM guidelines are explicit that museums "may elect to waive certain available defenses" such as, presumably, the statute of limitations.²³⁶ Further, the equitable "discovery rule," by which a statute of limitations does not begin to run until the claimant could reasonably discover the whereabouts of stolen property,²³⁷ protects the interests of claimants who have yet to locate their property, while incentivizing museums to make their collections widely known and available for research.²³⁸ Regardless of whether a particular jurisdiction applies the discovery rule to actions to

231. *E.g.*, J. Paul Getty Museum, Research on Museum Collection Provenance, 1933-45, <http://www.getty.edu/museum/research/provenance/> (last visited Feb. 14, 2010) (documenting compliance with the AAMD guidelines); Minneapolis Institute of Arts, Provenance Research Project, http://www.artsmia.org/index.php?section_id=107 (last visited Feb. 8, 2010) (documenting compliance with the AAMD and AAM guidelines); Museum of Modern Art, Provenance Research Project, <http://www.moma.org/explore/collection/provenance/> (last visited Feb. 8, 2010) (documenting compliance with the AAM guidelines).

232. *See* Clark, *supra* note 83, at 371-400; Kennedy, *supra* note 171 ("Agreements between parties without resort to judicial channels have been frequent.").

233. *See supra* notes 87-89 and accompanying text; *see also* Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008); *see generally* Clark, *supra* note 83, 371-400 (listing eleven claims against private parties in the United States, seven of which were settled or resolved in the claimant's favor).

234. Norton Simon Complaint, *supra* note 129, at 8; Complaint for Declaratory Relief at 16-17, *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2009) (No. 07-CV-11074); Complaint for an Order Quieting Title to Property Pursuant to 28 U.S.C. § 1655, Declaratory Judgment and Injunctive Relief at 7-8, *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006) (No. 3:06 CV 7031).

235. *See* Clark, *supra* note 83, at 371-400. Of the twenty-eight "resolved" cases listed that involved U.S. museums, the statute of limitations barred recovery only twice. *Toledo Museum of Art*, 477 F. Supp. 2d 802; *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007). *But see infra* note 239.

236. AM. ASS'N OF MUSEUMS, *supra* note 11.

237. *See, e.g.*, *O'Keeffe v. Snyder*, 416 A.2d 862, 869 (N.J. 1980) ("[I]n an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action.").

238. Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT'L L. 1177, 1192-93 (2005).

recover stolen works of art, nothing suggests that a responsible museum would raise a statute of limitations defense against a truly meritorious claim brought in good faith.²³⁹

E. The Unique Facts of Von Saher Implicate the Prudential Political Question and Act of State Doctrines

Contrary to the Ninth Circuit Court of Appeals' determination, *Von Saher* should not have been dismissed on the grounds that the statute was preempted by the federal foreign affairs power, but rather on the grounds that, regardless of the statute of limitations, the case presents a nonjusticiable political question, or, in the alternative, implicates the act of state doctrine.

The facts of this particular case indicate that Marei Von Saher's grievance must be addressed not by a U.S. court or the Norton Simon Museum, but rather by the Dutch government.²⁴⁰ The United States' post-war policy of external restitution vested sole responsibility for determining the fate of *Adam* and *Eve* in the Dutch government.²⁴¹ "Once assets had been delivered to . . . claimant nations, no further U.S. involvement was deemed necessary or desirable."²⁴² Unlike an act of the Nazi government, which under established policy and precedent would not be entitled to any deference under the act of state doctrine, the decision of the Dutch government to settle the Stroganoff-

239. See Kennedy, *supra* note 171 (suggesting that the "moral authority" of the non-binding Washington Principles, the "opprobrium of one's peers," and the threat of losing "one's good name in the art world" are sufficient to ensure museums will act in the spirit of the Washington Principles); see also Clark, *supra* note 83, at 371-400. Twenty-four of the twenty-eight resolved museum cases listed involve the return of the work to the claimant, the museum's purchase of the work from the claimant, or a settlement, despite the fact that in many cases, the museum could most likely have raised a technical statute of limitations defense. Clark, *supra* note 83, at 371-400. The *Toledo* and *Detroit* cases, which involved the same family, were complicated by issues aside from the statute of limitations issue. *Toledo Museum of Art*, 477 F. Supp. 2d at 807; *Detroit Inst. of Arts*, 2007 WL 1016996, at *2. In those cases, the fact that the original owner had successfully prosecuted numerous post-war compensation claims, yet had never claimed the particular paintings at issue, cast doubt upon the heirs' assertions that the wartime sale had been coerced. *Toledo Museum of Art*, 477 F. Supp. 2d at 807; *Detroit Inst. of Arts*, 2007 WL 1016996, at *2.

240. Cf. *Alperin v. Vatican Bank (Alperin II)*, 410 F.3d 532, 562 (9th Cir. 2005) ("In this case, the Holocaust Survivors must look to the political branches for resolution of [their claims] which, at base, are political questions.").

241. See *supra* Part I.B.

242. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., *supra* note 14, at SR-140.

Scherbatoff claim in 1966 is precisely the sort of sovereign act upon which U.S. courts wisely choose not to pass judgment.²⁴³

Further, the Dutch government's efforts in the last decade to reopen the claims process were accompanied by the recognition that it was responsible for accounting, in some form, for artworks disposed of by auction in the early 1950s,²⁴⁴ which included some of the Goudstikker collection.²⁴⁵ Based on a theory of unjust enrichment, the government estimated the proceeds from such sales and proposed to donate a portion to a Jewish cultural charity.²⁴⁶ In principle, then, the Dutch government should be accountable for all its decisions to dispose of restituted works, particularly in a case like the Stroganoff-Scherbatoff claim, where money changed hands and the Dutch government was enriched by the transaction.²⁴⁷

Conclusion

Courts should allow the relatively few Holocaust-era art claims that are actually litigated to proceed, and decide each on its merits. The doctrine of dormant foreign affairs preemption should not be used to invalidate state legislation that facilitates existing claims for the recovery of Holocaust-era assets, unless that legislation clearly stands in conflict with positive law, policy, or other action on the part of the federal government. In the absence of such federal action, states should be free to legislate in their areas of traditional competence, notwithstanding any incidental effect on foreign affairs.²⁴⁸ Although the federal government has manifested its general interest in seeing justice done for Holocaust survivors, it has chosen not to provide a federal mechanism for recovery of Holocaust-era artworks, nor to legislate on the subject, but rather to permit the resolution of claims on a case-by-case, and state-by-state, basis. Statutes like section 354.3 of the California Code of Civil Procedure serve to further the broadly stated federal interest by assisting the victims of the Holocaust in resolving meritorious claims for lost property where it is within a state's jurisdiction to do so and where no other prudential considerations require abstention or dismissal. U.S. museums, guided by the

243. See *supra* Part II.A.

244. ORIGINS UNKNOWN ADVISORY COMM., *supra* note 142.

245. Kaye, *supra* note 138, at 58–59.

246. ORIGINS UNKNOWN ADVISORY COMM., *supra* note 142.

247. Norton Simon Complaint, *supra* note 129, at 18.

248. See *Zschernig v. Miller*, 389 U.S. 429, 458–59 (1968) (Harlan, J., concurring in the result).

expressed, but nonspecific, federal interest in the resolution of Holocaust-era claims, have demonstrated their willingness to return works of art to their rightful owners in response to meritorious claims. So long as courts avoid the unnecessary exercise of dormant foreign affairs preemption, the existing ethical and legal framework is adequate to ensure a “just and fair solution” to Holocaust-related claims.

